> For the discrepancies to "jump off the page and slap you in the face," they must be of such weight and significance that no reasonable person could have chosen [the person who got the job] over [the plaintiff].

Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1090 (11th Cir. 2004); *Stuart v. Jefferson County Department of Human Resources*, 2005 WL 2456420 at *3 (11th Cir., Oct. 6, 2005) (quoting *Wilson*).

In a series of decisions, the Eleventh Circuit has quoted and endorsed a leading Fifth Circuit decision holding that these two formulations are equivalent. *Deines v. Texas Dept. of Protective and Regulatory Servs.*, 164 F.3d 277 (5th Cir. 1999).

> In *Deines* . . . the Fifth Circuit [held] that: "disparities in qualification are not enough in and of themselves to demonstrate discriminatory intent unless those disparities as so apparent as virtually to jump off the page and slap you in the face." 164 F.3d at 280. The court explained that the phrase "jump off the page and slap you in the face" "should be understood to mean that disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question."

Alexander v. Fulton County, Georgia, 207 F.3d 1303, 1340 (11th Cir. 2000); *Lee v. GTE Florida, Inc.*, 226 F.3d 1249, 1254 (11th Cir. 2000) (quoting *Deines*); *Cooper v. Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004) (quoting *Lee* quoting *Deines*).

This repeatedly stated equivalence makes clear why the Eleventh (and Fifth) Circuit standard has proven in practice to be impossible to satisfy. To require a plaintiff to show that "no reasonable person, in the exercise of impartial judgement" could have promoted (or hired) the competing applicant is to insist that the plaintiff demonstrate that the employer's actions would fail the rational basis test. That is a requirement which no plaintiff in the Eleventh Circuit has ever been able to satisfy. Every employment discrimination defendant insists it picked the best candidate, and no employer would be so foolish as to give an explanation so utterly bizarre that a court would label it irrational.

The use of this "no reasonable person" standard (like its equivalent, the "slap in the face" standard) for determining the sufficiency of evidence of racial discrimination is inconsistent with the repeated decisions of this Court that the rational basis test is entirely different from, and requires a far more compelling showing than, the requirement – embodied in Title VII and the Equal Protection Clause – that a plaintiff demonstrate that a disputed action was motivated by an impermissible consideration. *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 370-71 (2001); *Kimel v. Florida Board of Regents*, 528 U.S. 62, 83-84 (2000).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

ALICIA K. HAYNES
HAYNES & HAYNES, P.C.
1600 Woodmere Drive
Birmingham, AL 35226
(205) 879-0377

ERIC SCHNAPPER
(*Counsel of Record*)
School of Law
University of Washington
P.O. Box 353020
Seattle, WA 98195
(206) 616-3167

Counsel for Petitioner

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 04-13887 and 05-10184
Non-Argument Calendar

D.C. Docket No. 02-01835-CV-AR-M

LOLA HITHON,

Plaintiff-Appellee,

versus

TYSON FOODS, INC.,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Alabama

(August 3, 2005)

Before BLACK, WILSON and PRYOR, Circuit Judges.

PER CURIAM:

Appellant, Lola Hithon, appeals the district court's grant of summary judgment for Tyson Foods, Inc. in her employment discrimination suit. Hithon sued her employer, Tyson Foods, Inc., ("Tyson"), for race discrimination in violation of 42 U.S.C. § 1981 for its failure to promote her to two different human resources managerial positions. Hithon also claims that she was retaliated against

for her involvement in a lawsuit brought against Tyson in which Hithon's husband was a party. Finding no error, we affirm the district court's ruling.

A. Background

Hithon, an African American, began her employment at Tyson on July 1, 1985 as an hourly saw operator. Since 1987, she has held various positions with Tyson. These positions include the following: accounting clerk, front-line supervisor, retention supervisor, plant facilitator, employment supervisor, shift personnel manager, plant coordinator, shipping superintendent, shift manager, and plant personnel manager. Over the years, Hithon's performance has been exemplary and without disciplinary action.

Tyson organizes its Alabama operations into three "complexes": Albertville, Oxford, and Snead. Each of these complexes is run by a complex manager who has final authority and is the final decision-maker over the complex and its subordinate facilities. All of Hithon's employment with Tyson has been at the Gadsden processing plant which is the subordinate facility in the Snead complex. During the relevant time period, Ricky Walters was the complex manager of Albertville, and John Pittard was the Oxford complex manager.

In February 2000, Hithon applied for the position of complex human resources manager for the Albertville complex. This position became available when Jerry Phillips, a Caucasian employee, resigned. Although Tyson had a policy of promoting from within the company, Phillips was awarded the position when he announced that he desired to return to work at Tyson. Phillips was

placed back into his previous position on February 21, 2000.

In July 2000, Hithon applied for the position of complex human resource manager for the Oxford complex. Pittard posted the opening and interviewed Hithon and three other candidates, two of whom were also African American. The interview process for this position included a ranking of each candidate by Pittard. The six areas in which the candidates were ranked was as follows: education, human resources manager experience, total human resources experience, references, community involvement, willingness to relocate, motivation, presence, and relationship with the union. Pittard's first choice for the vacant position was Jacinta Carter, an African American employee; however, she declined this position and accepted a position as the Human resources manager for the Pine Bluff, Arkansas complex.

Lisa Burdick, a Caucasian employee, was Pittard's second choice to fill this position. Burdick, a college graduate, was the human resources manager of the Ashland facility at the time she applied for the Oxford position and had held that position since December 1998. In contrast, Hithon had only been the human resources manager of the Gadsden facility since March 1999 and had not obtained a college degree. Burdick accepted the Oxford position in July 2000.

On July 25, 2000, Hithon began the process of filing a formal grievance with Tyson. According to the grievance, Hithon disagreed with Pittard's ranking of the candidates and his ultimate selection of Burdick. Hithon also claims that immediately following her interview for the position, Pittard questioned another employee about the suit

brought by Hithon's husband against Tyson alleging race discrimination. Further, Hithon complained that Pittard's choosing Burdick for the position was a decision motivated by race.

Hithon bases her discrimination claim on the denial of two promotions: (1) Phillips's reinstatement to the Albertville human resources management position and (2) Carter's and ultimately Burdick's promotion to the Oxford human resources management position. Hithon also claims retaliation based on the denial of a promotion to the Oxford position.

On appeal, Hithon argues that the district court erred in granting summary judgment in favor of Tyson. We review the district court's grant of summary judgment *de novo*, applying the same standards used by the district court. *Killinger v. Samford Univ.*, 113 F.3d 196, 198 (11th Cir. 1997). Summary judgment is appropriate when "there is no genuine issue as to any material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986). In examining the record, we review the evidence in the light most favorable to the non-moving party. *See Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1085 (11th Cir. 2004).

B. Hithon's 42 U.S.C. § 1981 Claims Regarding the Albertville Position

Notwithstanding the Supreme Court's recent *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369 (2004) decision, we hold that Hithon's § 1981 claims regarding the denial of the Albertville position are time-barred by the Alabama statute of limitations. The Supreme Court in *Jones* stated that Congress's 1990 enactment of 28 U.S.C. § 1658, which created a default four-year statute of limitations for

federal causes of action created after that date, changed the limitations period for some claims under § 1981 to four years. *Id.* at 378-79. Additionally, the Court held that to the extent that the Civil Rights Act of 1991 created new causes of action not previously cognizable under § 1981, such claims were subject to the "catch-all" statute of limitations of § 1658. *Id.* at 381-82. This changed prior Supreme Court precedent as set forth in *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987). In that case, the Court held that in order to determine the proper statute of limitations, federal courts were to apply the most analogous state statute of limitations to § 1981 claims, which in this case, would be two years under Alabama law.

Congress amended § 1981 in 1990 to include a cause of action for discrimination in the terms and conditions of employment as well as discrimination in the making and enforcement of contracts. *See* 42 U.S.C. § 1981. Therefore, it is necessary to determine whether Hithon's claims were cognizable before the effective date of the four-year "catch-all" statute of limitations under § 1658. If so, then her claims would be time-barred under *Goodman*.

Hithon argues that her claims are governed by § 1658 and thus not time-barred. Section 1658 provides: "Except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of the enactment of this section may not be commenced later than 4 years after the cause of action accrues." 28 U.S.C. § 1658(a). Section 1658 was enacted on December 1, 1990. Therefore, Hithon's claims are subject to the four-year statute of limitations if they arose under an Act of Congress enacted after that date.

We find that Hithon's § 1981 claims were cognizable under *Patterson v. McLean Credit Union*, 491 U.S. 164, 176-77, 82 (1989), which applied to § 1981 before the amendments contained in the Civil Rights Act of 1991. Under *Patterson*, a failure to promote claim was actionable under § 1981 if the promotion "rises to the level of an opportunity for a new and distinct relation between the employee and the employer." *Id.* at 185. Hithon claims that she was denied a promotion for an [sic] human resources manager position because of her race. We find that these promotions rise "to the level of an opportunity for a new and distinct relation between the employee and the employer." *Id.* at 185. Therefore, Hithon's failure to promote claims were cognizable before Congress's 1991 expansion of § 1981 and thus remain subject to the Alabama two-year statute of limitations as mandated by *Goodman*.

C. Timeliness of Hithon's Title VII Claims Regarding the Albertville Position

We find that Hithon filed her Equal Employment Opportunity Commission ("EEOC") complaint more than ten months after Phillips returned to the Albertville Human Resources position for which Hithon applied. Charges regarding alleged discriminatory acts must be filed within 180 days of the alleged act. 42 U.S.C. § 2000e-5(e)(1). Although Hithon notes this argument in her statement of the issues, she makes no legal argument and provides no analysis in her brief regarding the timeliness of her Title VII claim. We therefore deem this issue abandoned on appeal. *See Sepulveda v. United States*, 401 F.3d

1226, 1228 n.2 (11th Cir. 2005).[1] Thus, we hold that Hithon's § 1981 and Title VII retaliation claims based on the denial of the promotion for the Albertville position are time-barred. Accordingly, we affirm the district court's holding on these issues.

D. Hithon's Claims Arising from Oxford Position

We now turn to the merits of Hithon's discrimination and retaliation claims based on the denial of the Oxford promotion. Hithon fails to establish a prima facie case for retaliation or discrimination with regard to the Oxford human resources manager position.

In order to prevail on a discriminatory failure to promote claim, a plaintiff must establish the following: (1) she is a member of a protected class; (2) she was qualified and applied for the promotion; (3) she was rejected despite her qualifications; and (4) other equally or less qualified employees who were not members of the protected class were promoted. *Alexander v. Fulton County, Ga.*, 207 F.3d 1303, 1339 (11th Cir. 2000). Hithon proves the first three elements necessary to establish a prima facie case of

[1] Hithon stated several others issues in her brief but made no legal argument and provided no analysis as to these issues. Thus, the following issues are deemed abandoned: "whether the trial court erred to reversal in granting the defendant's motion to strike the affidavit of Melody Lloyd; whether the trial court erred to reversal in finding that plaintiff had not identified any practice through statistics or otherwise to support her disparate impact claim; and whether the trial court erred to reversal in not considering the case *Desert Palace v. Costa*, 539 U.S. 90, 123 S. Ct. 2148 (2003) as controlling in establishing plaintiff's prima facie case and rebutting defendant's articulated reasons for termination." *See Sepulveda v. United States*, 401 F.3d 1226, 1228 n.2 (11th Cir. 2005)

discrimination. However, she did not show that an equally or less qualified employee who was not in her protected class was promoted to the position. First, Burdick, the employee who was finally placed in the Oxford position was more qualified than Hithon. Burdick had a four-year college degree and had more experience as a plant manager than did Hithon. Additionally, the record reflects that Burdick successfully implemented a new managerial program aimed to improve effectiveness and efficiency.

As for her retaliation claims, in order to succeed Hithon must show that "(1) [s]he engaged in protected activity; (2) [s]he suffered an adverse employment action; and (3) there was a causal link between h[er] protected activity and the adverse employment action." *Bass v. Bd. of County Comm'rs, Orange County, Fla.*, 256 F.3d 1095, 1117 (11th Cir. 2001).

In analyzing Hithon's retaliation claim, Hithon claims that the protected activity in which she engaged was that of her husband's lawsuit against Tyson. We have not directly addressed whether a Plaintiff, who works with a close relative who engaged in statutorily-protected activity, is entitled to bring a retaliation claim. We note that the Third, Fifth and Eighth Circuits have previously addressed this issue. Those Circuits have held that a plaintiff may not bring an action for a retaliation claim without personally participating in the protected activity. *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568-70 (3rd Cir. 2002); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1226-27 (5th Cir. 1996); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998). Hithon did not personally participate in her husband's retaliation claim. Yet, we need not decide this issue today. Assuming arguendo that Hithon has met her burden of establishing a prima facie

case for discrimination and retaliation, for both claims, we apply the *McDonnell Douglas* burden-shifting framework. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973). The burden shifts to Tyson to produce a legitimate, non-discriminatory reason for the adverse employment action. *Id.* Given Burdick's superior credentials and qualifications, Tyson has satisfied this burden. Every member of the review panel ranked Hithon last out of the candidates considered for the position.

Because Tyson produced a legitimate, non-discriminatory reason for Hithon's adverse employment decision, the burden then shifts back to Hithon to prove that Tyson's reasons were pretextual. *Id.* at 804. Hithon fails to meet this burden as well. Hithon has not provided the quantum of evidence necessary to establish that Tyson's legitimate, race-neutral reasons were pretextual. Hithon does argue that she was more qualified than Burdick. Although a disparity in qualifications could support an inference of discrimination, reviewing the record as a whole, Hithon has failed to establish a qualification disparity of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen Burdick over Hithon for the Oxford job.

For the foregoing reasons, we affirm the district court's grant of summary judgment to Tyson.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

LOLA HITHON,	)	
Plaintiff,	)	CIVIL ACTION NO. 02-AR-1835-M
v.	)	
TYSON FOODS, INC.	)	
Defendant.	)	

MEMORANDUM OPINION

(Filed July 23, 2004)

Before the court is the motion for summary judgment (Dkt. #42) and evidentiary submissions filed on April 16, 2004 by defendant, Tyson Foods, Inc. ("Tyson"). The complaint of plaintiff, Lola Hithon ("Hithon"), contains nine counts: (1) race discrimination in violation of Title VII with respect to "a promotion and raise she sought, but was treated less favorably and paid less in comparison to her white co-workers due to her race"; (2) race discrimination in violation of 42 U.S.C. § 1981 with respect to "the promotions and pay raises she sought and was wrongfully denied the promotions"; (3) disparate impact in violation of Title VII and 42 U.S.C. § 1981; (4) disparate treatment in violation of Title VII and 42 U.S.C. § 1981 in that "[b]lack employees are treated less favorably and paid less in comparison to their white co-workers and due to their race"; (5) intentional infliction of emotional distress under Alabama law; (6) negligent hiring, training, supervision, and retention under Alabama law; (7) breach of contract under Alabama law; (8) retaliation in violation of "28 [*sic*] U.S.C. Section 2000e *et seq.*"; and (9) breach of implied

covenant of good faith and fair dealing under Alabama law. *See* Dkt. #22.[1] Tyson moves for summary judgment on all counts.

Tyson's Motion to Strike

Included within Hithon's evidentiary submissions is the affidavit of Melody Lloyd. (Dkt. #60, Ex.2). Lloyd's affidavit attributes a discriminatory statement to John Pittard, the Tyson supervisor who decided not to promote Hithon in July 2000. Tyson moves to strike the Lloyd affidavit because: Lloyd has never been disclosed as a fact witness pursuant to Rule 26, F.R.Civ.P.; Lloyd's affidavit contains inadmissible hearsay; and Lloyd's affidavit is not notarized. The motion to strike is due to be granted.

The discovery deadline in this action was January 26, 2004. Hithon's disclosure of Lloyd follows Tyson's motion for summary judgment and comes after all discovery deadlines have passed. Tyson's ability to depose Lloyd is non-existent. Additionally, Hithon offers as proof of a matter at issue a statement allegedly made by Pittard to another employee, Lloyd, who purports to have learned of Pittard's statement from yet another employee, Lisa Burdick. This is the grossest form of hearsay and is due to be excluded. Tyson's final argument is without merit. Lloyd's affidavit does substantially comport with the requirements of 28 U.S.C. § 1746(2). Consequently, it

[1] In Hithon's opposition brief, she concedes counts 5, 7,and 9. She characterizes her action as arising "out of two primary events: 1) the denial of a promotion to the Albertville Complex Human Resource Manager position in February 2000; and 2) the denial of a promotion to the Oxford Complex Human Resource Manager in July 2000." (Dkt. #61 at 2).

would not have needed to be notarized, even though it has now been notarized. The notarization added nothing.

The court will strike the affidavit by separate order.

Summary-Judgment Facts

Hithon, who is black, began her employment at Tyson on July 1, 1985 as an hourly saw operator. Since 1987 she has held various positions including accounting clerk, front-line supervisor, retention supervisor, plant facilitator, employment supervisor, shift personnel manager, plant coordinator, shipping superintendent, shift manager, and plant personnel manager. Hithon's performance has been exemplary and without disciplinary action.

All of Hithon's employment with Tyson has been at Tyson's Gadsden processing plant. Tyson organizes its Alabama operations into three "complexes": Albertville, Oxford, and Snead. Each complex is run by a complex manager who has final authority and is the final decision-maker over the complex and its subordinate facilities. The Gadsden plant is a subordinate facility in the Snead complex. During the relevant time period, the Albertville complex manager was Ricky Walker, who is white, and the Oxford complex manager was John Pittard, who is white.

In February 2000, Hithon applied for the position of complex human-resources manager for the Albertville complex (the "Albertville position"). The position opened when Jerry Phillips, who is white, resigned. Although Tyson has a policy of promoting from within the company, Phillips was awarded the position when he announced that he desired to return. Phillips was placed back into the position on February 21, 2000.

In July 2000, Hithon applied for the position of complex human-resource manager for the Oxford complex (the "Oxford position"). Pittard posted the opening and interviewed Hithon and three other candidates: Ever Higgins, who is black; Jacinta Carter, who is black; and Lisa Burdick, who is white. Pittard ranked the candidates in six areas: education, HR manager experience, total HR experience, references, community involvement, willingness to relocate, motivation, presence, and relationship with the union.[2] Pittard's first choice was Carter, but she declined the position. Instead, Carter accepted the position of human-resource manager for the Pine Bluff, Arkansas complex.

Burdick was Pittard's second choice. Burdick was the human-resources manager of the Ashland facility at the time she applied. She had been in that position since December 1998 and had successfully implemented Tyson's "RISE" program at that facility.[3] Additionally, Burdick had a college degree. Hithon had served as the human-resources manager of the Gadsden facility since March 1999 and only had some college. Pittard offered the position to Burdick in late July 2000. She accepted.

On July 25, 2000, Hithon began the process of filing a formal grievance.[4] Hithon disagreed with Pittard's ranking

---

[2] Tyson reproduces Pittard's decision matrix in its briefs. (Dkt. #43 at 11 & Dkt. #65 at 10).

[3] RISE "was a program put in to help work turnover and control costs through overtime reduction." Burdick took the idea behind the policy, created and implemented a program for the Ashland facility that resulted in a dramatic reduction in turnover rate.

[4] Tyson established a four-person review panel and hired an independent consulting firm to oversee the review. The panel affirmed Pittard's selection of Burdick for the Oxford position three to one – the

(Continued on following page)

of the candidates and his ultimate selection, Burdick. She further complained that immediately following her interview for the position, Pittard questioned another employee about the trial of a case that had been brought by Hithon's husband and another man named Ashe against Tyson alleging race discrimination. Hithon believed, and alleges, that Pittard's selection was racially motivated.

Summary-Judgment Standard

Summary judgment is appropriate if the pleadings, depositions, and affidavits show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue is "material" if it is a legal element of the claim under applicable substantive law which might affect the outcome of the case. *Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986); *Allen v. Tyson Foods,* 121 F.3d 642, 646 (11th Cir.1997). An issue is "genuine" if the record, taken as a whole, could lead a rational trier of fact to find for the nonmoving party. *Id.* On a motion for summary judgment, the court must view all the evidence and all factual inferences drawn therefrom in the light most favorable to the nonmoving party, and determine whether that evidence could reasonably sustain a jury verdict. *Celotex,* 477 U.S. at 322-23; *Allen*, 121 F.3d at 646. The court cannot make credibility determinations, weigh the evidence or draw inferences from the evidence. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986).

---

one black panelist concluded that Higgins was the best candidate. All four panelists ranked Hithon last.

The moving party bears the burden of informing the court of the basis for its motion and demonstrating the "absence of evidence on an essential element of the non-moving party's case." *Celotex Corp.*, 477 U.S. at 323, 325. To withstand a motion for summary judgment, the non-moving party may not simply rest on the pleadings. Rather, it **must** "make a showing sufficient to establish the existence of [the] element[s] essential to that party's case, and on which that party will bear the burden of proof at trial. . . ." *Id.* at 322. If the non-moving party fails to make this showing, then the moving party is entitled to judgment as a matter of law. *Celotex Corp.*, at 323.

Analysis

Initially, the court finds that Hithon's claims regarding the Albertville position are untimely. Charges must be filed with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the alleged discriminatory act. 42 U.S.C. § 2000e-5(e)(1). Failing to file charges within 180 days bars plaintiff from filing such a claim based on this alleged act of discrimination. *Everett v. Cobb County Sch. Dist.*, 138 F.3d 1407, 1410 (11th Cir.1998). Hithon filed her EEOC complaint on January 3, 2001, more than ten months after Phillips was returned to the Albertville position.

Hithon admits that her claim regarding the Albertville position was filed more than 180 days after the violation, but asserts an equitable exception – continuing violation. She argues that the promotion denials in February and July 2000 were part of a series of discriminatory acts. However, the Supreme Court has defined "discrete discriminatory acts" to include "termination, **failure to**

promote, denial of transfer, or refusal to hire." *National R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 114 (2002) (emphasis added). Each promotion denial "constitute[d] a separate actionable 'unlawful employment practice.'" *Id.* The equitable doctrine of continuing violation does not bridge Tyson's decision in February 2000 regarding the Albertville position to its decision in July 2000 regarding the Oxford position. Hithon's claim regarding the Albertville position is untimely and Tyson is due summary judgment on this claim.

Hithon's claims filed pursuant to 42 U.S.C. § 1981 are also untimely. Hithon commenced this action by filing her complaint on July 25, 2002. The forum state's statute of limitations for personal-injury claims – two years in Alabama – applies to these claims. *Taylor v. Alabama Intertribal Council,* 261 F.3d 1032, 1034 (11th Cir.2001). Tyson returned Phillips to the Albertville position on February 21, 2000. Hithon's complaint was filed more than two years thereafter and, therefore, Hithon's § 1981 claim regarding the Albertville position is beyond the two-year statute of limitations and is barred.

Turning to the burden in this mixed-motive case, Hithon asserts that the Supreme Court's recent decision in *Desert Palace v. Costa,* 539 U.S. 90, 123 S. Ct. 2148 (2003), has eviscerated 30 years of well-established precedent. She argues that the burden-shifting framework articulated in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), no longer exists. (Dkt. #61 at 25). However, nowhere in *Desert Palace* does the Supreme Court even intimate, much less say, that it is overruling, restricting, or clarifying *McDonnell Douglas. Desert Palace* clarifies that a Title VII plaintiff can

establish an employer's liability "using direct **or circumstantial evidence.**" 123 S. Ct. at 2154. The decision does nothing more. To further illustrate this point, this court notes that more than a year after the *Desert Palace* decision, no Eleventh Circuit authority embraces Hithon's interpretation.[5] Accordingly, Hithon's promotion, disparate treatment, and retaliation[6] claims will be evaluated using the familiar, 30-year-old *McDonnell Douglas* framework.

This requires that Hithon first raise an inference of discrimination or retaliation by establishing *a prima facie* case. *Batey v. Stone*, 24 F.3d 1330, 1333 (11th Cir.1994). If a *prima facie* case is established, the burden shifts, and Tyson must proffer a legitimate, nondiscriminatory reason for the adverse employment action. *Meeks v. Computer Assoc. Int'l,* 15 F.3d 1013, 1021 (11th Cir.1994). Hithon can still survive summary judgment by then proffering evidence "to permit a reasonable fact finder to conclude that the employer's proffered non-discriminatory reasons were not what actually motivated its conduct." *Combs v. Plantation Patterns,* 106 F.3d 1519, 1528 (11th Cir.1997); *see also Chapman v. AI Transp.*, 229 F.3d 1012, 1024-25 (11th Cir.2000) (en banc); *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 148 (2000). This final shift is determinative in this case.

---

[5] *See Wilson v. B/E Aerospace, Inc.*, 2004 WL 1459558, *5 (11th Cir. June 30, 2004) (holding *McDonnell Douglas* framework applies to disparate-treatment claims supported by circumstantial evidence).

[6] Although Hithon's complaint refers to "28 U.S.C. § 2000e," instead of "42 U.S.C.," as the basis of her retaliation claim, it is sufficiently clear that she is proceeding under Title VII to put Tyson on notice of this claim.

Assuming *arguendo* that Hithon had established a *prima facie* case, she has not rebutted Tyson's legitimate, nondiscriminatory rationale for selecting Burdick rather than her.[7] An employer's decision as to who is the most qualified for a position is not a decision that should be re-examined by the courts as long as the decisions are not unlawfully motivated. *Alexander v. Fulton County,* 207 F.3d 1303, 1341 (11th Cir.2000). While prior cases suggest that a subjective criterion "cannot be relied upon by an employer seeking to defeat the plaintiff's prima facie case," *Carter v. Three Springs Residential Treatment,* 132 F.3d 635, 644 (11th Cir.1998), the Eleventh Circuit has recently clarified that "[a] subjective reason is a legally sufficient, legitimate, nondiscriminatory reason if the defendant articulates a clear and reasonably specific factual basis upon which it based its subjective opinion." *Chapman v. A.I. Transp.,* 229 F.3d 1012, 1034 (11th Cir.2000) (en banc). The issue thus becomes whether Tyson has offered a "clear and reasonably specific factual basis" for Pittard's articulated subjective reason.

In addition to the decision matrix that Pittard created, Tyson points to Burdick's college education and her implementation of the RISE program as making her the superior candidate. Pittard and Tyson made the subjective judgment that these qualifications counted for more than Hithon's experience. The court does not sit to resolve the wisdom or accuracy of Tyson's conclusion. *Rojas v. Florida,* 285 F.3d 1339, 1342 (11th Cir.2002). The only question is whether discriminatory animus or retaliation motivated the decision. *Id.* Hithon's subjective

[7] Consequently, the court does not address whether Hithon has established a *prima facie* case of those claims.

beliefs and self-serving speculation that she was more qualified than Burdick, that Burdick's implementation of the RISE program was not successful, and that Pittard's offer to Carter was a sham are inapposite. Whether the proffered reason is pretext rests upon the employer's provable motive, not the employee's self-serving perception of it. *Holifield v. Reno,* 115 F.3d 1555, 1565 (11th Cir. 1997) (citing *Billet v. CIGNA Corp.*, 940 F.3d 812, 818-22 (3rd Cir. 1991)). Tyson's motion will be granted on these claims.

Hithon also asserts disparate-impact claims pursuant to Title VII and 42 U.S.C. § 1981. She claims that the administration of Tyson's Albertville and Snead complexes are 100% white, while "the corresponding hourly workforce is comprised of 80% minorities." (Dkt. #22 ¶33). Disparate impact discrimination "prohibits neutral employment practices which, while non-discriminatory on their face, visit and adverse disproportionate impact on a statutorily-protected group." *EEOC v. Joe's Stone Crab, Inc.,* 220 F.3d 1263, 1274 (11th Cir.2000). In order to establish a *prima facie* case, "the plaintiff must offer statistical evidence of a kind and degree to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group." *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 994 (1988); *see also Edwards v. Wallace Community College,* 49 F.3d 1517, 1520 (11th Cir.1995) (holding that a "plaintiff must identify a specific employment practice that leads to disparate impact"). Although Hithon's statistics show that a significant majority of the administration is white, she fails to identify **any practice** –through statistics or otherwise – that causes the disparity. *See, e.g., Evans v. McClain, Inc.,* 131 F.3d 957, 963 (11th Cir.1997) (rejecting plaintiff's theory that disparate

impact was shown when employer had only three black supervisors despite employing 650 individuals in eight plants). Moreover, she provides no statistics on the racial make-up of the qualified applicant pool. Therefore, Tyson's motion will granted on this claim.

The claims brought under Alabama law ring a bit hollow but need not be addressed by this court. They will be dismissed without prejudice after the basis for supplemental jurisdiction disappears.

An appropriate order will be entered.

DONE this 23rd day of July, 2004.

/s/ William M. Acker
WILLIAM M. ACKER, JR.
UNITED STATES
DISTRICT JUDGE

No. 05-579

IN THE

Supreme Court of the United States

LOLA HITHON,

Petitioner,

v.

TYSON FOODS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DAVID M. SMITH
JANELL M. AHNERT *
MAYNARD, COOPER
& GALE, P.C.
1901 Sixth Avenue North
2400 AmSouth/Harbert Plaza
Birmingham, AL 35203
(205) 254-1000

* Counsel of Record

Counsel for Respondent

January 6, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

Whether the test the Eleventh Circuit uses to assess "comparative qualifications" claims—*i.e.*, claims in which a Title VII plaintiff relies solely on his or her superior qualifications to establish that an employer's reasons for a challenged promotion decision are pretextual—conflicts with the test used in other circuits, which uniformly require a showing of *markedly* superior qualifications, and employ a variety of substantively indistinguishable verbal formulations to express this requirement;

Whether this case is an appropriate vehicle for addressing any alleged conflict, in view of the fact that petitioner did not argue that she was more qualified under the criteria the employer actually used to assess candidates, but rather that petitioner was more qualified under the criteria she believes should have been used;

Whether this case is an appropriate vehicle for addressing any alleged conflict based on the fact that an independent committee reviewed the promotion decision at issue in this matter and reached the same conclusion, and there is no evidence that the committee's decision was tainted by race discrimination.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, respondent states that Barclay's Global Investors, N.A. presently owns more than 10% of the stock of Tyson Foods, Inc. (NYSE: TSN).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
RULE 26.9 STATEMENT	ii
TABLE OF AUTHORITIES	iv
BRIEF IN OPPOSITION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	12
ALL CIRCUITS APPLY THE SAME BASIC STANDARD TO PRETEXT CLAIMS BASED ON COMPARISONS OF QUALIFICATIONS	12
CONCLUSION	21

TABLE OF AUTHORITIES

CASES	Page
Adarand Constructors, Inc. v. *Pena*, 515 U.S. 200 (1995)	19
Aka v. *Washington Hospital Ctr.*, 156 F.3d 1284 (D.C. Cir. 1998)	15-16
Board of Trustees of University of Alabama v. *Garrett*, 531 U.S. 356 (2001)	20
Bullington v. *United Air Lines*, 186 F.3d 1301 (10th Cir. 1999)	14, 15
Burlington Industries, Inc. v. *Ellerth*, 524 U.S. 742 (1998)	20
Byrnie v. *Town of Cromwell*, 243 F.3d 93 (2d Cir. 2001)	14, 15
Clark County School District v. *Breeden* 532 U.S. 268 (2001)	20
Cleburne v. *Cleburne Living Center, Inc.*, 473 U.S. 432 (1985)	19
Deines v. *Texas Department of Protective and Regulatory Services*, 164 F.3d 277 (5th Cir. 1999)	16
Dennis v. *Columbia Collection Medical Ctr.*, 290 F.3d 639 (4th Cir. 2002)	15
Fishbach v. *D.C. Department of Correc.*, 86 F.3d 1180 (D.C. Cir. 1996)	14-15
Harris v. *Forklift Systems, Inc.*, 510 U.S. 17 (1993)	20
Jones v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004)	3-4
Kimel v. *Florida Board of Regents*, 528 U.S. 62 (2000)	19
Lee v. *GTE Florida, Inc.*, 226 F.3d 1249 (11th Cir. 2000)	15, 17
Meritor Savings Bank, FSB v. *Vinson*, 477 U.S. 57 (1986)	20

TABLE OF AUTHORITIES—Continued

	Page
Millbrook v. *IBP*, 280 F.3d 1169 (7th Cir. 2002)..	14, 15
Odima v. *Westin Tuscon Hotel*, 53 F.3d 1484 (9th Cir. 1995)	15
Odom v. *Frank*, 3 F.3d 839 (5th Cir. 1993	16
Peters v. *Lieuallen*, 746 F.2d 1390 (6th Cir. 1984)	14
Pennsylvania State Police v. *Suders*, 542 U.S. 129 (2004)	20
Price Waterhouse v. *Hopkins*, 490 U.S. 228 (1989)	13
Raad v. *Fairbanks North Star Borough School District*, 323 F.3d 1185 (9th Cir. 2003)	17
Rathbun v. *Autozone*, 361 F.3d 62 (1st Cir. 2004)...13-14,	15
Scott v. *University of Mississippi*, 148 F.3d 493 (5th Cir. 1998)	14, 15
Texas Department of Community Affairs v. *Burdine*, 450 U.S. 248 (1981)	13
FEDERAL STATUTES	
42 U.S.C. § 1981	3
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*	3
American with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A)	20
MISCELLANEOUS	
Webster's Third New International Dictionary (1971)	16

IN THE

Supreme Court of the United States

No. 05-579

LOLA HITHON,

Petitioner,

v.

TYSON FOODS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

BRIEF IN OPPOSITION

The petition should be denied because the Eleventh Circuit's unpublished and non-precedential decision raises no important question of federal law warranting this Court's review.

First, there is no conflict in the lower courts over the standard that applies to "comparative qualifications" claims—*i.e.*, claims in which a Title VII plaintiff relies solely on his or her qualifications to establish that an employer's reasons for a challenged promotion decision are a pretext for unlawful discrimination. In such cases, the courts of appeals uniformly require plaintiffs to show that their qualifications were *mark-*

edly superior to those of the selected candidate. Although the lower courts have used different phrases to describe this degree of superiority, the differences in these verbal formulations are wholly semantic; the Eleventh Circuit itself has used many of the phrases petitioners identify as different legal standards to explain why a particular plaintiff failed to satisfy the "slap in the face" test. This is clearly evidenced by the Eleventh Circuit's opinion in this matter, in which the court affirmed the district court's grant of summary judgment, holding that the petitioner "failed to establish a qualification disparity of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen Burdick over [the petitioner] for the Oxford job." Pet. at 9a.

Further, even if there were any substantive differences, this case is an inappropriate vehicle for addressing the issue: Petitioner's real claim is that she was more qualified under the criteria that she believes *should have been used*, not those that were actually used. Further, an independent committee reviewed the promotion decision at issue in this matter and reached the same conclusion, and there is no evidence that the committee's decision was tainted by race discrimination.

STATEMENT OF THE CASE

Petitioner Lola Hithon instituted this action by filing a Complaint against Tyson Foods, Inc. ("Tyson" or "respondent") in the United States District Court for the Northern District of Alabama, Middle Division, alleging various acts of race discrimination (disparate impact[1] and disparate treat-

[1] In her brief to the Eleventh Circuit, petitioner listed as an issue before the court the district court's decision to dismiss her disparate impact claim, but made no legal argument and provided no analysis regarding the same. The Eleventh Circuit deemed this issue as abandoned, Pet. at 7a, and petitioner did not appeal that decision to this Court.

ment) and retaliation[2] pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and 42 U.S.C. § 1981, as well as a number of claims under Alabama state laws.[3]

On April 16, 2004, Tyson filed a Motion for Complete or Partial Summary Judgment. In response, petitioner voluntarily dismissed her claims under Alabama law of intentional infliction of emotional distress, breach of contract and breach of implied covenant of good faith and fair dealing. Pet. at 11a, note 1. The District Court granted Tyson's Motion for Summary Judgment on July 23, 2004, and dismissed, with prejudice, petitioner's remaining claims of race discrimination in violation of Title VII, race discrimination in violation of § 1981, disparate impact, disparate treatment and retaliation.[4]

Petitioner filed a Notice of Appeal with the Eleventh Circuit Court of Appeals on July 30, 2004. On August 12, 2004, The Honorable William M. Acker, Jr. wrote counsel for both parties highlighting the possibility that the United States

---

[2] Petitioner originally asserted a retaliation claim arising from an alleged remark made regarding litigation her husband was pursuing against Tyson. The district court granted summary judgment as to petitioner's retaliation claim and petitioner appealed this decision to the Eleventh Circuit. However, petitioner has made no argument in the Petition for a Writ of Certiorari before this Court that the decision regarding her retaliation claim should be reversed.

[3] In addition to alleging claims arising from the July 2000 promotion decision as discussed in the petition before this Court, petitioner originally alleged claims arising from a February 2000 promotion decision at Tyson's Albertville facility. However, the Eleventh Circuit determined that this claim was untimely, Pet. at 6a, and petitioner did not appeal this holding.

[4] The district court also dismissed, without prejudice, petitioner's state law claims of negligent hiring, training, supervision, and retention as the court no longer had a basis for supplemental jurisdiction. Petitioner did not appeal the dismissal of those claims to the Eleventh Circuit, and refiled the same in the Circuit Court of Jefferson County, Alabama.

Supreme Court decision in *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, might have affected the statute of limitations period applicable to petitioner's claims. The letter suggested the parties consider requesting that the Eleventh Circuit grant a limited remand to allow the district court to evaluate the effect, if any, that *Jones* had on the issues in this case. On August 31, 2004, petitioner filed a motion for limited remand with the Eleventh Circuit. On September 8, 2004, petitioner filed a Motion to Reconsider and/or Vacate Order on Summary Judgment with the district court. On October 4, 2004, the district court, believing it did not have jurisdiction, entered an order denying petitioner's Motion for Reconsideration. On October 26, 2004, petitioner filed a second Motion to Remand, which the Eleventh Circuit denied as unnecessary, as the case was already stayed to allow petitioner to renew her Rule 60(b) motion in the district court. On November 30, 2004, petitioner filed a second Motion for Reconsideration and/or Motion to Vacate Order on Summary Judgment Pursuant to FRCP 60(b). The district court denied petitioner's Motion on December 13, 2004, and petitioner filed an Amended Notice of Appeal with the Eleventh Circuit on December 29, 2004. The Eleventh Circuit rejected all of petitioner's arguments, affirming the grant of summary judgment.

In July 1985, petitioner began her employment with Tyson in production as a Sawhand, an hourly position she held until January 1987 when she became an Accounts Payable Clerk. Throughout petitioner's employment with Tyson, she only worked at the Gadsden processing plant, which is a part of the Snead Complex. In February 1989, petitioner was promoted to Frontline Supervisor (another production job) and remained in that role until May 1993, when she became Retention Supervisor/Plant Facilitator, her first human resources related position. In January 1994, petitioner was promoted to Employment Supervisor. In this role, petitioner was responsible for recruiting and hiring the hourly workforce at the

Gadsden plant. Petitioner worked as Employment Supervisor until March 1996, when she returned to the production side of Tyson in the position of Acting Superintendent. From March 1995 until April 1997,[5] petitioner worked as Shift Personnel Manager. Petitioner again returned to the production side of Tyson, serving as Production Coordinator/Shipping Superintendent from April 1997 through May 1998. In May 1998, she became Night Shift Manager, becoming responsible for production at the facility on the night shift. Petitioner was promoted to Plant Personnel Manager, or Plant HR Manager, of the Gadsden plant the following March and held that position at the time she sought the position at issue in this matter.

In early June 2000, the Oxford Complex Manager, John Pittard, posted an open position on Tyson's intranet site—the Oxford Complex Human Resources Manager. In addition to petitioner, three other Tyson employees expressed interest in the position: Jacinta Carter (African American), Lisa Burdick (White) and Ever Higgins[6] (African American).

At the time of her application for the Oxford position, Burdick had worked for Tyson for approximately eight years as a Personnel Clerk, Southeast Regional Insurance Coordinator, Human Resources Trainee (North Alabama Complex),

---

[5] Petitioner's resume reflects that she worked as Shift Personnel Manager from March 1995 until April 1997 and as Acting Superintendent from March 1996 until July 1996. Petitioner testified that those jobs did not overlap and that there must be a typographical error on her resume. Petitioner is unsure when she assumed the role of Shift Personnel Manager.

[6] Higgins also pursued litigation against Tyson based on the promotion of Burdick. Her claims were dismissed by the District Court at summary judgment which was affirmed by the Eleventh Circuit. Higgins has also filed a Petition for Writ of Certiorari, *Ever Higgins* v. *Tyson Foods, Inc.*, No. 05-535, presenting the same question as petitioner in this matter. This same question is also presented in *Ash* v. *Tyson Foods, Inc.*, No. 05-379.

Shift Human Resources Manager (Gadsden facility, Snead Complex) and Plant Human Resources Manager (Ashland facility, Oxford Complex). Burdick had a bachelor's degree in marketing, which she received from Jacksonville State University in 1996. In June 2000, when she applied for the Oxford Complex HR Manager position, Burdick was working as the Plant Human Resources Manager at the Ashland facility (Oxford Complex).

Pittard reviewed each applicant's resume and interviewed each of the candidates in person. Pittard also sought references regarding each candidate. Pittard contacted some of Carter's current and past supervisors (David Massey, Complex Manager for South Georgia; Jonathan Andrews, Buena Vista HR Complex Manager; and Don Schaeffer, former Buena Vista Production Supervisor) for their assessments of her performance. Carter received outstanding referrals from each person Pittard contacted. With regard to the other three candidates—petitioner, Higgins, and Burdick—Pittard contacted current managers who were familiar with all three candidates: Wally Taylor, Snead Complex Manager, Mark Waller, former Oxford Complex Manager, and Allen Trotter, Division Training Manager. In addition, Pittard contacted Johnny Whittaker, the Union Business Agent. Pittard asked each individual which candidate he would select for the Oxford Complex HR Manager position of the three candidates with whom they were familiar (petitioner, Higgins, and Burdick). Each stated to Pittard that he would choose Burdick for the position.[7]

Once all of the interviews were completed, Pittard generated a matrix to assess his ranking of the candidates in the categories that he considered relevant to the position, with 1

---

[7] Trotter initially said he would choose Higgins to avoid a lawsuit. Pittard told him to put that aside and to choose the best candidate. Trotter then said Burdick was the best candidate.